TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~498.~~ 264

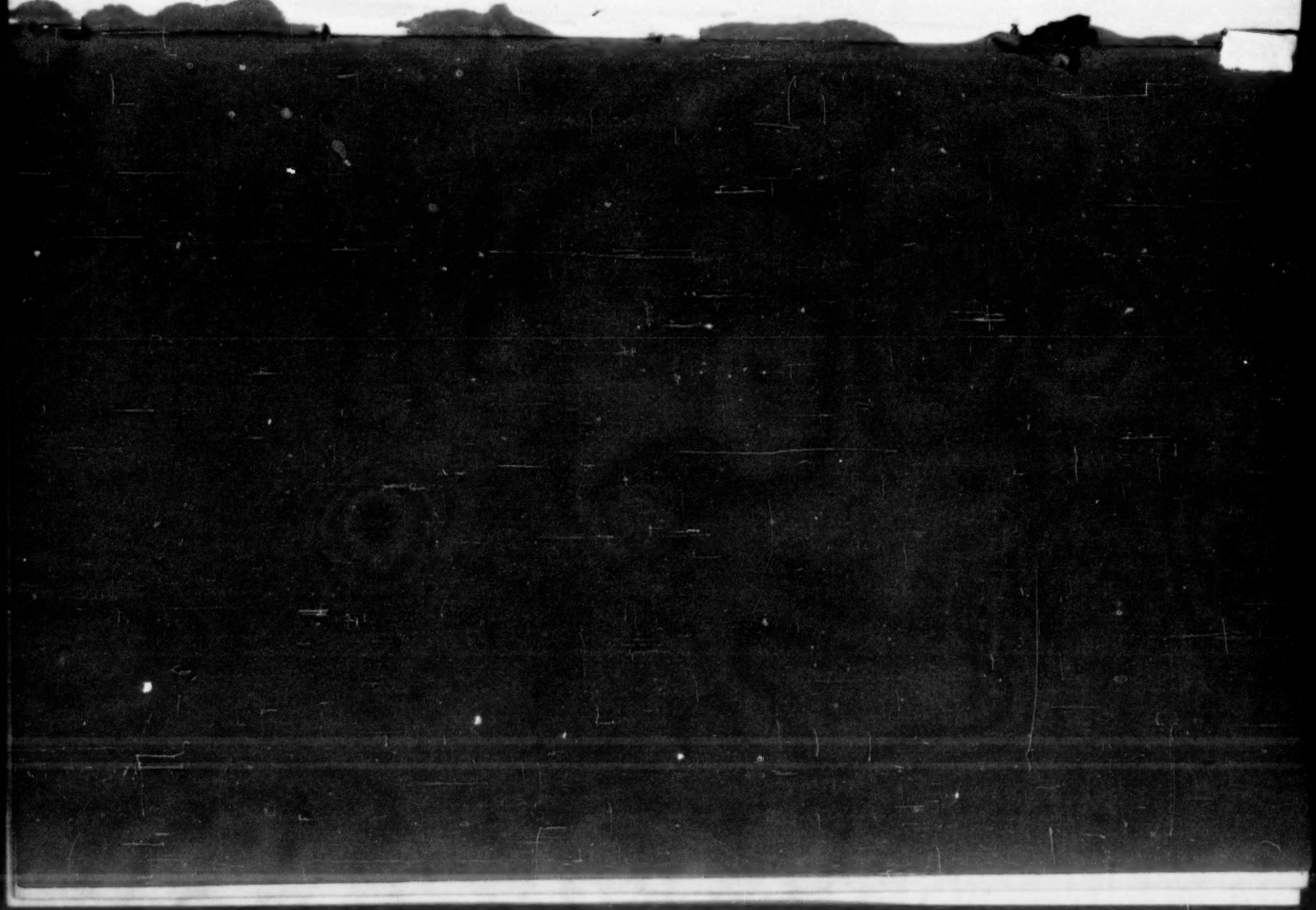
THE NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

MARY ANN CLOPTON, NANNIE BURKS, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED OCTOBER 19, 1870.



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1 State of Kentucky court of appeals.

At a court of appeals for the State of Kentucky held at the capital, in Frankfort, on the 18th day of August, in the year of our Lord 1870:
Present, Williams, chief justice; Robertson, Hardin, and Peters, judges.

Date of filing transcript.

NEW YORK LIFE INSURANCE COMPANY, appellant, *vs.* MARY ANN CLOPTON AND OTHERS, appellees. } Appeal from the Daviess circuit court.

Be it remembered that on the 6th day of November, 1869, the appellants filed with the clerk of this court transcript of record of an appeal granted them from a judgment of the Daviess circuit court; which transcript is as follows, to wit:

1½ STATE OF KENTUCKY,
Daviess Circuit Court:

Pleas before the Honl. George W. Williams, judge of the Daviess circuit court, at the court-house, in Owensboro, Ky., on Thursday, 16th day of September, 1869.

Parties.

MARY ANN CLOPTON, NANNIE BURK, AND Burk, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny T. Clopton, Benj. A. Clopton, the last 4 children of the said Mary Ann Clopton, who are infants under 21 years of age, and who sue by their next friend, Luther Cottrell, pl'ffs, *against* THE NEW YORK LIFE INSURANCE COMPANY, def'ts.

Be it remembered that on the 22d day of December, 1868, the plaintiffs filed with the clerk of this court their petition against the defendants; which petition is as follows, to wit:

2 *Petition.*

The plaintiffs, Mary Ann Clopton & others, state that Nannie Burks, Martha S. Clopton, Cornelia L. Clopton, Fannie F. Clopton, and Benjamin A. Clopton, are and were the children of the plaintiff, Mary Ann Clopton, the last four of whom are infants under 21 years of age, and the def't, The New York Life Insurance Company, is a corporation, and was incorporated under & by virtue of the laws of the State of New York, and is a non-resident of the State of Kentucky, and Morris Franklin is and was its president, and the said company is doing business in this Daviess County by & through their regularly constituted agent, T. S. Anderson.

They further state that on the 13th day of March, 1858, the def't, The

New York Life Insurance Company, issued a policy of insurance No. 12279, whereby they promised and agreed, in consideration of the sum of one hundred and eighty-one dollars & 50 cents to them
3 in hand paid by the said Mary Ann Clopton for the benefit of herself and children, and of the annual premium of one hundred & eighty-one dollars & 50 cents to be paid, on the 13th day of March in each year, during the continuance of said policy, to *issue* the life of James C. Clopton, a clergyman of the county of Campbell, State of Virginia, for the sole use of the said Mary Ann Clopton & her children, in the amount of five thousand dollars, for the term of his natural life, commencing on the 13th day of March, 1858, at noon; and whereby the said company did agree and promise "well & truly to pay, or cause to be paid, the said sum insured to the said Mary Ann Clopton, & her children, share and share alike, within sixty days after due notice and proof of the death of the said James C. Clopton;" and the said company on the 13th day of March, 1858, gave a written & printed permission to the said James C. Clopton to travel in the States of North
4 Carolina and Tennessee, signed by its president, the said Morris Franklin. The said policy No. 12279 and permission are filed as part hereof.

They further state that annually, after said policy was executed & delivered to the said pl'ff Mary Ann, the premiums were paid on the 13th day of March, in each year, and the said payments are fully shown by the order drawn by the said James C. Clopton in favor of A. B. Garland, agent, for $113 26 on Martin Hollins, the said Garland being the then authorized agent of said company to receive the said premiums. They file the said order, marked No. 1, with the assignment of said A. B. Garland, agent. The said premiums were also paid the 13th of March, 1860, & 1861, & 1862, and they *sign* the receipts of Morris Franklin, president as aforesaid, shewing such payments, marked Nos. 2, 3, & 4. They state that the said James C. Clopton, clergyman,
5 lived in the State of Virginia from the making of the said policy until the day of , 1864, when he died of a mortal disease, near the town of Lynchburg, in the county of Campbell, in the State of Virginia; and they say every proper care, nursing, & attention was bestowed upon said James C. Clopton by Doctor E. H. Murrell, a skilful physician, & the family and other friends of the said James C. Clopton; and he was buried, George officiating as undertaker, after funeral services by the Rev. H. W. Dodge, clergyman.

They state that all the premiums promised in said policy were duly paid by the 13th day of March in each year, up to and including the year 1862; and subsequent to that, & for the years 1863 & 1864; the plaintiffs, or one of them, proposed to & would have paid the premiums in said latter years, but were prevented from so doing because
6 they were within the military lines of the so-called Confederate States, and the defendant & the said Morris Franklin, president, were within the military lines of the United States, and the said United States & Confederate States were at war; and the latter, by superior force and its military orders, prevented the plaintiffs from paying the said premiums to the defendant; and the United States, by force & its military orders, forbade & prevented the pl'ff and all others in the said State of Virginia (where the pl'ffs were) from coming to the def'ts, or paying the def'ts, or holding any communication with the def't, or any one else situate within the control or line or States or territory subject to the power of jurisdiction of the United States; and they did propose, and the said James C. Clopton did propose and offer, to pay the

said premiums for the years 1863 & 1864 to A. B. Garland, the regularly constituted agent of the def't, and who, as such agent,
7 had issued the said policy to the pl'ffs; and the said Garland was, and continued to be, the agent for the defendant to issue policies & collect for them the annual premiums, and the said A. B. Garland would not & did not receive the same, & refused to receive the same, because the said confederate government has enacted an act of its congress sequestering all property and funds belonging to the citizens & people residing within said United States, or paying allegiance to the United States, & would have sequestered & forfeited and seized the said premiums if paid to said Garland, who then resided within & was subject to said confederate government. And they state that due and proper proofs and evidence was taken of the death of said James C. Clopton, and furnished to the defendant, and they now have the said proofs, and they were notified of the death of the said James C.
8 Clopton upon the 21st day of February, 1867, and notice of the death & proof thereof furnished to said company on the 28th day of August, 1868; and, as evidence of this, they file the letter of said Morris Franklin, president, dated then; and they have had notice of said Clopton's death divers times since said letter, and more than sixty days before the bringing of this suit, and yet the def'ts have wholly failed to pay the plaintiffs said five thousand dollars, or any part of it, & still fail & refuse, though the same has often been demanded of them, and the said sum remains wholly unpaid.

Whereupon they pray judgment for five thousand dollars, & interest from the death of said James C. Clopton, and for other proper relief.

SWEENY J. STUART, *P. Q.*

The endorsement on the foregoing petition is as follows, viz:

Endorsement on petition.

9 Filed Dec'r 22, 1868, & exhibits filed, & sum's & copy issued.
Att.: J. C. THOMPSON, *Clk.*

(The exhibits ref'd to in petition appear in bill of exceptions, pages .)

Summons.

Summons against The New York Life Insurance Company, directed to the sheriff of Daviess County, dated December 22, 1868, returned by him endorsed:

"Executed on T. S. Anderson, as agent of the New York Life Insurance Company, on the 28th day Dec'r, 1868.

"BEN. DUNCAN, *D. S.*,
"*For W. H. Perkins, S. D. C.*"

At the February term (1869) of said court the defendants filed the following demurrer:

Demurrer to petition.

The defendants demur to the petition of plaintiffs, and assign for cause—

1st. That the court has no jurisdiction of the matters in controversy in this case, nor the complaints set out in the petition.

2d. The pl'ffs' petition does not state facts sufficient to consti-
10 tute a cause of action.

Whereupon, &c.

RAY & HARDIS.

Order overruling demurrer.

And the court being advised overruled the demurrer; to which the def't excepts, and the plaintiffs tendered an amended petition, which was ordered to be filed.

The amended petition, filed Feb'y 17, 1869, is as follows, viz:

Amended petition.

The plaintiffs, Mary Ann Clopton, &c., state that the defendant is a foreign corporation & insurance company, having been incorporated by the laws of the State of New York, where the said company resides; but they have debts owing them in the county of Daviess, to wit, they hold the note of W. B. Pegram, James Stuart, & G. W. Ray, who live in the said county of Daviess, & reside there. The amount of said notes they do not know, but they are for the payment of money and interest; and they will, in August, 1869, owe the said company premiums on life policies amounting to as much as $500 00.

MARY ANN CLOPTON,
By Att'y.

11 James Stuart says he is one of the attorneys for pl'ffs Mary Ann Clopton, and she is absent from Daviess County, and he believes the statements in this & the original petition are true, and that the pl'ffs ought to recover in this action $5,000 00; and the pl'ff's claim grows out of the breaches of the covenants in a life policy on the life of Rev. Ja's C. Clopton, who departed this life in the year 1864. Said policy was issued by the def't, and said claim is a just debt, & the def't are a foreign corporation.

JAMES STUART.

Sworn to by James Stuart 16 Feb'y, 1869.
Att.: J'N P. THOMPSON, *Clk.*

And on 18 February, 1869, the def't filed the following demurrer, on grounds that it presented no cause of action:

Demurrer to petition.

Def't demurs to pl'ffs' petition because the facts therein stated do not constitute a cause of action against defendant.

RAY & HARDIN.

12 And the following order was made on February 20th, 1869:

Order overruling demurrer.

This action having come up for hearing on the demurrer to the petition on the grounds that the petition disclosed no grounds of action, and the court being advised, it is adjudged that the demurrer be over ruled.

And on 20th February, 1869, the defendants filed the following answer, to wit:

Answer.

The defendant, The New York Life Insurance Company, denies that A. B. Garland was the agent of the company during the war in 1861, 1862, & 1863, & 1864. Def't denies that The New York Life Insurance Company had any authorized agent within the confederate lines in the year 1861, 1862, 1863, & 1864, or in any of those years. Def't avers that in 1861, 1862, 1863, 1864, & to 1865, in the spring, a state of war existed between the United States and the so-called Confed-
13 erate States of America; and that the said Ja's C. Clopton and plaintiff, and A. B. Garland, the alleged agent for the defendant, were residents of the State of Virginia, which formed a part of the Confederate States. The def't denies that A. B. Garland was authorized to receive premiums on the life of James C. Clopton, after the proclamation of the President of the United States, in 1861, that war existed between the United States and the Confederate States. Defendant denies the existence of any agency in said confederacy after that time. Def't avers the fact to be that no agency of the said New York Life Insurance Company could exist on account of & during the war; that public policy & the laws of nations forbade it. Def't denies that the signature of Morris Franklin on receipts filed shows the receipt of the premiums for the years 1860, 1861, & 1862. Def't avers that the receipt of the president of The New York Life Insurance Company for premiums does not
14 show the payment of same until countersigned by an authorized agent. Def't has no knowledge or information sufficient to form a belief whether the receipts for the payments alleged to have been made in 1860, 1861, & in 1862 were countersigned by the alleged agent, A. B. Garland. Def't has no knowledge or information sufficient to form a belief whether the signatures on said receipts, purporting to be A. B. Garland, are his genuine signatures or not; whether James C. Clopton died in Virginia in 1864, or is dead at all.

Def't has no knowledge or information sufficient to form a belief whether all the premiums were paid on the 13th of March of each year up to & including 1862. Def't has no knowledge or information sufficient to form a belief, "and subsequent to that, & for the years 1863 and 1864, the pl'ffs, or one of them, proposed to & would have paid the premiums in said latter year," &c. Def't has no knowledge or information sufficient to form a belief.

15 Def't denies that plff's, or any of them, proposed to pay to The New York Life Insurance Company the premiums for the years 1863 & 1864, or for either of said years. Whether pl'ffs were prevented by the superior force & the military orders of the Confederate States from paying the premiums for the years 1863 & 1864, or for either of them, def't has no knowledge or information sufficient to form a belief. Whether James C. Clopton offered to pay the premiums for the years 1863 & 1864 to A. B. Garland, def't has no knowledge or information sufficient to form a belief. Def't denies that A. B. Garland was the regularly constituted agent of The New York Life Insurance Company for the years 1863 & 1864, or for either of said years. Def't denies that A. B. Garland had, as agent, issued the policy to pl'ffs.

Def't denies that the said A. B. Garland was, and continued to be, the agent of def't to issue policies and collect for them the annual
16 premiums. Def't denies that said Garland, as agent or otherwise,

ever had any authority to issue policies, or that he ever issued any policy to pl'ffs, or either of them, or to any one else. Def't has no knowledge or information, sufficient to form a belief, whether due and proper proofs and evidence of the death of Ja's C. Clopton was taken and furnished to def't or not; whether or not defendant was legally notified of the death of said Clopton before the 21st day of February, 1867, this def't has no knowledge or information sufficient to form a belief. Pl'ffs undertook & became bound by the terms of said policy to pay to def't the annual premiums on the 13th day of March of each year; and it is provided in said policy in case the said Mary Ann Clopton shall not pay the said premiums on or before the several days hereinbefore mentioned for the payment thereof, then, & in every such case, the said company shall not be liable for the sum insured, or any part thereof, and this policy shall cease and determine.

17 Defendant avers that said Mary Ann Clopton did not, on or before the 13th day of March, in the year 1863 & 1864, pay, or offer to pay, def't the annual premium for said years, or either of them; nor did she pay, or offer to pay, said annual premiums to any authorized agent of said company. Def't avers that if A. B. Garland had been their agent before the war, that relation ceased when the existence of the war was proclaimed by the President of the United States in 1861 between the United States & the so-called Confederate States; said war continued from the day of , 1861, until the day of , 1865.

The contract of insurance between plaintiffs & def't was discharged by supervening war, and neither party to said contract can have or maintain an action on the same for any cause occurring after the proclamation of war aforesaid. The New York Life Insurance Company only became bound to pay plaintiff sixty days after due notice &

18 proof of the death of Ja's C. Clopton, deducting therefrom all notes for premiums unpaid at the time of death. Now def't avers that only six-tenths of the premiums were annually payable in money, & notes given for the four-tenths remaining. Now def't says, in the event said company is liable to pl'ffs, then said Clopton gave his note annually for four-tenths of the premiums during the years he may have paid the premiums; said notes, and all of them, with accruing interest, are unpaid; and by pl'ff petition it appears the entire premiums for 1863 & 1864, with interest, are unpaid. The cash payment annually was $108 90, with interest on the note, which was $72 60. Def't denies that said New York Life Insurance Company is indebted to plaintiffs, or any of them, in the sum of five thousand dollars, or in any part thereof, on account of the insurance and the alleged death of

19 said James C. Clopton, because said def't says said policy lapsed on account of the non-payments of the annual premiums, and also by reason of the war in 1861 & to 1865, continuously, between the United States & the so-called Confederate States. Def't denies that said company holds the note of W. Pegram, James Stuart, & G. W. Ray, or either of them; denies that pl'ff ought to recover $5,000 00, or any part thereof; denies that their claim is just. Under & by the laws of The New York Life Insurance Company, when the party insured dies, his death must be proven by the affidavits of the attending physician of decedent and the clergyman officiating at the funeral, and of the sexton or undertaker having charge of the interment.

Def't says the by-laws form & are a part of the contract of insurance, & he will file a copy thereof as part of this answer. Now def't says no such proof has been furnished of the death of Ja's C. Clopton,

20 dec'd. Def't asks to go hence with his costs & for all proper relief.

T. S. ANDERSON,
By RAY & HARDIN.

On the 30th day of August, 1869, the following order was made:

Order of submission.

By consent of parties the law & facts herein are submitted to the court, but not to be taken up for hearing until the 34th day of this term.

Bill of exceptions.

Be it remembered that this action came up for trial on September 16, 1869, when the parties by consent heretofore waived a trial by jury, & submitted the law and facts to the court.

Upon the trial the plaintiff read in evidence the policy issued by the defendant, March 13, 1858, upon the life of Ja's C. Clopton; which policy is as follows, to wit, marked AA:

POLICY AA.

This policy of insurance witnesseth that The New York Life Insurance Company, in consideration of the sum of one hundred & eighty-one
21 dollars & fifty cents to them in hand paid by Mary Ann Clopton, wife of James C. Clopton, for the benefit of herself & children, and of the annual premium of one hundred and eighty-one dollars and fifty cents, to be paid on the thirteenth day of March, in every year, during the continuance of this policy, do assure the life of James C. Clopton, clergyman of , in the county of Campbell, State of Virginia, for the sole use of the said Mary Ann Clopton & children, in the amount of five thousand dollars, for the term of his natural life, commencing on the thirteenth day of March, 1858, at noon.

And the said company do hereby promise and agree, to and with the said assured, his executors, administrators, and assigns, well & truly to pay, or cause to be paid, the said sum insured to the said Mary Ann Clopton & children, or their legal representatives, share & share alike, within sixty days after due notice and proof of the death of the
22 said James C. Clopton; and in case of the death of the said Mary Ann Clopton, before the decease of the said James C. Clopton, the amount of the said insurance shall be payable after her death to her children for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the aforesaid James C. Clopton as aforesaid, deducting therefrom all notes for premiums on this policy unpaid at that time.

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions, that in case the said James C. Clopton shall, without the consent of this company previously obtained and endorsed upon the policy, pass beyond the settled limits of the United States that lie east of the Rocky Mountains, (excepting into the settled limits of the British Provinces of the two Canadas, Nova Scotia, or
23 New Brunswick,) or shall without such previous consent thus endorsed visit or reside in those parts of the United States which lie south of the southern boundaries of the States of Virginia & Kentucky between the first of July and the first of November, or shall without such previous consent thus endorsed enter into any military

or naval service whatever, (the militia not in actual service excepted,) or in case he shall die in or in consequence of a duel, or by the hands of justice, or in the known violation of any law of the United States, or of any State or country, or in case his death shall be caused by intoxicating drink or opium, this policy shall be null and void.

(Written on the margin:) All receipts for premiums paid at agencies are to be signed by the president or actuary.

And it is also understood and agreed to be the true intent and meaning hereof, that if the declaration made by the said Mary A.
24 Clopton, and bearing date the ninth day of March, 1858, and upon the faith of which this agreement is made, shall be *be* found in any respect untrue, then, and in such case, this policy shall be null & void; or in case the said Mary Ann Clopton shall not pay the said premiums, on or before the several days hereinbefore mentioned for the payment thereof, then, & in every such case, the said company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease & determine.

N. B.—If assigned, notice to be given the company.

In witness whereof the said New York Life Insurance Company have, by their president and actuary, signed & delivered this contract this thirteenth day of March, one thousand eight hundred & fifty-eight.

MORRIS FRANKLIN, *President.*

PLINY FREEMAN, *Actuary.*

The foregoing policy is endorsed:

25 No. 12279. Insurance in the life of James C. Clopton for benefit of his wife, Mary Ann Clopton, & children. Amount, $5,000 00. Date, March 13, 1858. Term of life. Annual payment, when due, March 13th.

Annual payment	$181 50
Policy	1
	$182 50

Also the written consent of defendant, dated March 13, 1858, consenting that assured might reside in North Carolina and Tennessee, which is as follows, (B B:)

Written consent of def't to pl'ff, (B B.)

"NEW YORK, *March 13th*, 1858.

"Policy, 12279. Life of Rev'd James C. Clopton, $5,000 00.—Permission is hereby given to Rev. James C. Clopton, the party insured under the policy No. 12279, to travel & reside in the State of North Carolina & Tennessee at all seasons of the year, and, by first-class vessels, to visit any northern port of the United States on the coast of the Atlantic.

26 "MORRIS FRANKIN, *Pres.*"

Also a paper signed Jas. C. Clopton, dated March 11, 1859, marked C C:

Order of J. C. Clopton on Mr. Hollins, (C C.)

$113\frac{25}{100}$. LYNCHBURG, *March* 11, 1859.

Mr. Martin Hollins will pay to A. B. Garland, ag't New York Life In-

surance Company, one hundred and thirteen $\frac{26}{100}$ dollars, and charge to account of

Y'r ob'd'nt s'v't,

JA'S C. CLOPTON.

Which order is endorsed as follows:

Pay to J. R. Holcomb & Co.

A. B. GARLAND, *Ag't.*
J. R. HOLCOMB, *&c.*

Also a paper signed Morris Franklin, pres't, dated March 13, 1859, as follows, (D D:)

Paper signed Morris Franklin, M'ch 13, 1859, *(D D.)*

NEW YORK LIFE INSURANCE COMPANY.

Policy No. 12279, $185 86 ..... { 108 90, cash, *cope.* / 72 60, note, 40 p. c., M'ch 13, 1859. / 4 36, int. on notes.

Received the sum of one hundred & eighty-five $\frac{86}{100}$ dollars in
27 full of annual premium on policy numbered as above, on life of J. C. Clopton, for $5,000, to March 13, 1860.

MORRIS FRANKLIN, *Pres.*

A. B. GARLAND.

The foregoing receipt is endorsed as follows, viz:

"Not valid unless countersigned by A. B. Garland.

"Premiums not paid when due, according to the terms of the policy, annuls the same, but may be renewed at the home office within a reasonable time upon satisfactory evidence of good health being furnished."

Also a paper signed Morris Franklin, pres't, March 13, 1861, as follows, E E:

Receipt—Morris Franklin, M'ch 13, '61, *(E E.)*

NEW YORK LIFE INSURANCE COMPANY.

Policy 12279, $194 57 ..... { 108 90, cash, 60 p. c. / 72 60, note, 40 p. c., M'ch 13, 1861. / 13 07, int. on notes.

Received the sum of one hundred & ninety-four $\frac{57}{100}$ dollars in full for annual premium on policy numbered as above, on life of J. C. Clopton, for $500, to March 13, 1862.

28 MORRIS FRANKLIN, *Pres.*

A. B. GARLAND, *Ag't.*

The foregoing receipt is endorsed as follows:

"Not valid unless countersigned by A. B. Garland.

"Premiums when not paid when due, according to the terms of this policy, annuls the same, but it may be renewed at the home office within a reasonable time upon satisfactory evidence of good health being furnished."

The pl'ffs then read in evidence the deposition of A. B. Garland, which is as follows, to wit, (marked F F:)

Deposition of A. B. Garland, (F F.)

The deposition of A. B. Garland, taken on th' 6th day of July, 1869, in answer to interrogatories, says:

1st. Who was the agent for The New York Life Insurance Company that issued the policy No. 12279 to Mrs. Mary Ann Clopton & others on the life of Rev'd James C. Clopton, a copy of which is now here shown you. Please said copy a part of your answer, and mark it (No. 12279 A.)

29 Answer. I was the agent of The New York Life Insurance Company in March, 1858, and I remember that I induced the Rev. J. C. Clopton to make application for insurance, & I know said company issued a policy of insurance, during the time I acted as agent, upon the life of said Clopton, for the benefit of his wife, Mary Ann Clopton, & his children; and, to the best of my recollection & belief, the writing herewith filed as a part of this deposition, and marked 12279 A, is a true copy of the policy issued to said Clopton by said company as aforesaid.

2d int. If you were their agent, how were you constituted? If by power of attorney, please file the same, or copy of it, or any paper you have, and say whether, as agent, you for any length of time corresponded with said company, or remitted to it premiums or other moneys collected by you as agent. How long did you act as agent for the

30 company, and did you issue for them policies other than this to Mrs. Clopton, &c.?

Ans. I was the regularly appointed agent of The New York Life Insurance Company by virtue of a commission or power of attorney from said company, with its corporate seal attached, a copy of which cannot be filed herewith as a part of this deposition, because the original, together with all the other papers & books of my office, were destroyed or misplaced by the Federal Army when they entered Petersburg in April, 1865. As agent aforesaid I had frequent correspondence with said company in forwarding applications, remitting premiums, & other matters of business pertaining to my agency. I do not remember the date, of my recollection. I acted as agent five or more years. I never issued a policy to any one. I only forwarded applications to the company, and, if approved, policies were filled up at the home office, signed by the president, & countersigned by the actuary, and then sent to me;

31 and, when the premium & policy fee were paid, endorsed by myself, & delivered to the proper parties.

3d. Please examine the copies of receipts for premiums, and state whose signature was to the original, and whether, as agent for the company, you countersigned them & filled them up.

Answer. All statements for due premiums and receipts for same were made out (as well as memory serves me) at the home office, in the city of New York, signed by the proper officers, & forwarded to me; & when I received the premium from the proper parties, I endorsed and delivered it to them.

4th. Please state whether the premiums were paid each year at or before the time fixed in the policy for their payment, and up to and including what year were they paid.

Answer. Mr. Clopton was always very punctual in paying his premiums as long as I would receive them; and whenever he would

32 pay one he would request me to be certain to give him timely notice when the next one would fall due. He seemed to regard it as a sacred deposit for the future use of his wife & children; and, to the best of my belief, the last premium I received of him I received in March, 1861, through my banker, Messrs. Peters, Spruce & Co., of Lynchburg, to whom I had sent the usual receipt, properly signed & endorsed, to be handed over to him when paid, which covered his insurance to March, 1862.

5th. State whether said Rev'd James C. Clopton is dead, when did he die; and if the premiums were not paid for the years 1863 & 1864, why were they not paid. Were you then receiving premiums, and, if not, did you decline receiving them? If yea, why did you decline?

Answer. I was not present at the death of the Rev. James C. Clopton, nor do I now remember the date of the death. I first saw
33 it announced in a Richmond paper, and I afterwards visited his family; did not see him in his accustomed place, fulfilling the duties of husband and father. His wife was clad in the sombre habiliments of widowhood & his children in garb of orphanage, &, while I did not see him die, I have no more doubt that he is dead than I have that I am at this writing living. As well as I remember, in March, 1862, when the premium for 1863 was due, the said Clopton tendered me his premium, which I declined to accept in the absence of any instructions from the company aforesaid upon the subject. I was still the agent, my appointment having never been revoked. All communication between the two sections having been cut off, for I had had no communication with the company for many months, altho' I was anxious, & had used every means known to me to do so, my reasons
34 for refusing premiums were these: All premiums were payable in the currency of the State, which, by the operations of the war, had depreciated. A sequestration law had been inaugurated by the new government under which I was then living, which required all persons indebted to or holding funds belonging to northern corporations to report the amounts & pay over same to the commissioners; and, as a faithful agent for the company, as well as for the policy-holders, I deemed it advisable and prudent no longer to receive premiums under the then existing state of the country; and, to protect the policy-holders, I took from them an obligation to pay the amounts of their premiums, with the interest from dates, to The New York Life Insurance Company whenever hostilities ceased, setting forth the fact of their offering to pay & of my refusal to accept the premium, which notes were at first generally given by the policy-holders, and I believe by the said
35 Clopton, all of which were destroyed or misplaced with the books & papers of my agency, as before stated.

6th. Did the said company at any time discharge you as agent, or revoke your powers; if they did, why was it done, & when?

Answer. My appointment as agent of The New York Life Insurance Company has never been revoked, so far as I have heard. In July or August of 1865 I was in the city of New York, and called upon Mr. Franklin, president of said company, who agreed that I should continue my agency; but, after returning to Petersburg, one of my fields for operation, I found the old policy-holders so prejudiced against the company, as they stated, on account of the illiberal & unjust course toward them, that I did not think I could do any business for the company, & afterwards wrote to the president to that effect, & declined longer to act as agent.

7th. Has the company, at any time since Clopton's death, made

36 any effort to get said policy No. 12279 delivered up to them? Do you know anything about it?

Answer. I never knew or heard of any effort being made by The New York Life Insurance Company to get possession of policy No. 12279.

8th. State whether payment of the premiums for the years 1863 & 1864 was prevented by you, or by any other means, & what prevented it; & whether said Clopton, or Mrs. Mary A. Clopton, (pl'ff,) consulted you as to the payment of them.

Ans. I did, as stated in answer No. 5, refuse to receive premiums for 1863. Mr. Clopton did consult me, & offered to pay his premium in 1862, which I refused to receive for reasons fully set forth in answer No. 5.

9th. State whether, in said years 1863 & 1864, it was possible to conduct business communications between Virginia & New York, or whether the premiums could have been paid at the main office,

37 or to the company, in New York.

Answer. As a general thing, all business communications between Virginia and New York had been cut off, & I know of no safe or reliable way in which premiums could have been paid at the office in New York. There were, no doubt, spies, scouts, & blockade-runners in the service of the two governments, and in the service of secret contraband companies, known only to those immediately interested, through whom perhaps occasional communications might have been had, if parties had been in their confidence & disposed to pay a heavy bonus for the privilege, and assume all risk & responsibility themselves; of such, however, I know nothing personally.

10. Where did said Rev'd James C. Clopton & Mary A. Clopton live at the issual of the policy, & where did they continue to live until & at his death; and whether, in 1863 & 1864, war existed between the Federal Government and Confederate States, & was actively

38 being waged in Virginia, & whether said war prevented payment of the premiums?

Ans. They lived at their residence in the county of Campbell, Va., about 3 miles from Lynchburg, and continued there until his death. Mrs. Clopton & children still live there, or did, the last I knew anything of their whereabouts. In the years mentioned Virginia was the common battle-ground of the federal and confederate armies, & was the most cruel & devastating war being waged; which war, I believe, was the cause of the premiums due upon the policy of the Rev'd James C. Clopton not being paid.

Cross-interrogatories by def't:

1st. Did an agent issue policy 12279 to Mrs. Mary Ann Clopton & others? If you say yes, say by whom, & how you know it.

Answer. No agent, according to my belief and knowledge, ever issued policy No. 12279 to Mrs. Mary Ann Clopton & others.

39 2d. If you say you corresponded with The New York Life Insurance Company during the years 1861, 1862, 1863, and 1864, say when & what was the date of your last correspondence with them, & please file the same as part of your deposition. If you remitted them any premiums in any of the years aforesaid, say how & when. If you say you issued policies to Mary Clopton & others, by whom were you authorized; and is it not true that you only received & forwarded to the office in New York applications for policies; and, if accepted, were not the policies then sent to you for delivery to the applicant?

Ans. As well as memory now serves me, my last communication with

The New York Life Insurance Company was had in July, 1861. I remitted premiums to said company nearly if not every month in that year, up to July. My premiums were generally sent by draft on some one of the banks of New York City, enclosed in a letter directed
40 to Morris Franklin, president of The N. Y. Life Ins. Co., numbers 112 & 114, Broadway, New York City. A copy of said correspondence cannot be furnished as part of the deposition, because all the papers & books belonging to my agency has been misplaced or destroyed, as stated in a previous deposition. I never issued policies; only received & forwarded applications, &, if accepted by the New York office, the policy was issued, signed by the proper officers, & sent to me, & by me endorsed and delivered to the applicant upon payment of the policy fee & premium.

4th. (No number 3.) To whom & how did you pay the premiums? Were the annual premiums paid for the years 1863–1864?

Ans. As previously stated, premiums were generally sent by draft on some of the banks of the city of New York, enclosed in a letter addressed to the president of the company. The annual premiums
41 for the years 1863 & 1864 were never received by me.

5. State, of your own personal knowledge, what you may know of the death of Rev. James C. Clopton, & the date of his death, & where.

Ans. Of the date & place of the death of Rev. James C. Clopton, as I was not personally present when he died, I personally know nothing of either.

6th. Did you feel yourself authorized to receive premiums as agent of said insurance company for the years 1863 & 1864; if you say you did not, what was the reason?

Answer. I never doubted my authority or right to receive premiums for the years mentioned, as my appointment as agent for said company had never been revoked or recalled, nor had I ever been instructed not to do so; on the contrary, one of the last, if not the very last communication I remember to have received from Morris Franklin, esqr., president, would have justified me in so doing; which communication
42 was published in a Petersburg newspaper for the benefit of all concerned, and did at the time give increased confidence in the good intention & determination of The New York Life Ins. Company to protect its southern policy-holders. My reasons for not receiving the premiums are fully given in my answer to interrogatory No. 5.

7th. If you say said insurance company made any efforts to have said policy delivered up to them, state what effort was made, and who made it, & by what authority.

Answer. I am not cognizant that The New York Life Insurance Company ever made any effort to have said policy delivered up to them.

8th. If you say said Clopton or Mrs. Clopton consulted you in regard to the payment of premiums, state which of the two, when & where.

Ans. To the best of my belief & knowledge, in March, 1862,
43 in the town of Lynchburg, Va., said Clopton offered to pay me his premium for 1863, which I declined to accept for reasons already given, but took his obligation to pay same, with interest from the date, to The New York Life Ins. Company when peace was established between the North & the South; which note, with many others, were destroyed or misplaced with all the other papers & records of my agency, as previously deposed.

9th. Is it not true that a great many persons passed, in the years 1863 & 1864, from Virginia into the States north, then held by the federal

Ann Clopton, (who is the pl'ff,) is dead; &, if dead, when & where he died.

2d. Who was the officiating pastor or minister of the gospel at his funeral? Who was the physician that treated him in his last sickness, & of what sickness did he die? How long was he sick before he died? Did you or not see him expire, or see him after he was dead? How soon after his death was he buried? Where was he buried? And are there or not any monuments indicating the place of his interment? Who was the sexton that officiated at his burial? Who was the
51 undertaker, & was or not his burial case or coffin paid for, & by whom? Has there been any letters of administration granted of his estate? Please file a copy of them.

4th. If you know anything of the payment of premiums under the policy No. 12279 on his life, in favor of Mrs. Mary Ann Clopton, state what you know; or, if you know any reasons or causes why the premiums for 1863 & 1864 were not paid, state them.

5th. Was or not your testimony to the effect you now have given it taken, & when, as near as you can state?

6th. State anything further you may know material to either party to this suit.

Cross-interrogatories by def't:

2d. How far from James C. Clopton's residence did the officiating clergyman & physician reside? How long had you known him before his death?

4th. If you say anything of the payments of the premiums
52 under policy No. 12279, are your answers from your personal knowledge or from information derived from others? If you give reasons why the premiums were not paid for the years 1863 & 1864, state whether these reasons are given from your own personal knowledge, or whether they are based on information furnished by others. State the name of every person present while you were giving your deposition.

E. H. Murrell deposition, H H.

Deposition of E. H. Murrell, taken July 21, 1869; who, being sworn, says, in answer—

To 1st interrogatory: He is certainly dead & buried. He died at his residence, near this city, in the year 1864, on the 18th day of May. His residence was in the county of Campbell, State of Virginia.

To 2d interrogatory he says: Rev. H. W. Dodge, of the Baptist Church, officiated at his funeral. I, Edw'd H. Murrell, of the city of Lynchburg, Va., a regular practicing physician in said city, am the physician
53 who treated him in his last sickness. He died of congestion of the lungs. He was sick for about ten days before he died. I did not see him expire. I saw him a short while before. I saw him after he was dead. He died on 18th May, & was buried on the 20th. I do not know where he was buried; do not know of any monuments indicating the place of his interments. We have no sexton here. I was not present, & did not aid in his burial. I do not know who was the undertaker, & know nothing of his burial case or coffin, nor whether the same was paid for. I do not know whether letters of administration have been granted on his estate.

To 4th interrogatory, (no third:) I know nothing of the payment of premiums under the policy. There was in 1863 & 1864 a war pending

between the sections of deceased & def't respectively, and all communication of a business nature was broken up between the two sections.

54 To 5th interrogatory says: About a year or two ago I gave testimony in substance as above, for the purpose of enabling Mrs. Clopton to establish her claim against the insurance company.

To 6th he says: I know Mr. Clopton was fully able to pay any premiums in his policy of insurance, if an opportunity had offered.

Cross-examined:

To 2d interrogatory says: The officiating clergyman & physician resided about 2 miles & a half from Mr. Clopton's residence. I had known Mr. Clopton about 20 or 25 years.

To cross-int. 4th: I said nothing about the payment of the premiums. What I stated why the premiums *why* not paid was based upon my own personal knowledge. Mr. G. H. Burch, Mr. G. A. Dinguid, (a part of the time,) & J. H. Lewis, the notary public, were the only persons present while I was testifying.

E. H. MURRELL.

55 *Deposition of G. H. Burch, H H.*

Deposition of G. H. Burch, taken at same time & place; being sworn, says, in answer—

To 1st interrogatory: Rev'd James C. Clopton is certainly dead. He died on 18th May, 1864, at his residence, in Campbell County, Virginia.

To 2d interg. says: Henry W. Dodge, pastor of the Baptist Church of Lynchburg, was officiating clergyman on the occasion, assisted by Rev'd Dr. Seely, then of Hollins Institute, in this State. Dr. E. H. Murrell was the physician who attended him in his last sickness. He died of congestion of the lungs. He was sick about ten days before he died. I did not see him expire; I saw him soon after he was dead. He was buried on the second day after his death; he was buried at Spring Hill Cemetery, about one mile from Lynchburg. There are no monuments indicating the place of his interment, so far as I know. We have no sextons here. I was present, but did not aid in his burial.

56 Geo. A. Dinguid was the undertaker. His coffin and burial expenses were paid by the firm of J. W. & E. H. Burch, and charged to Clopton's estate, & duly paid to us by his administratrix, Mrs. Mary A. Clopton. Letters of administration were granted on his estate, a certified copy of which is herewith filed, marked G. H. B.

To 4th interrogatory says: I was present once when a payment was paid of the premium to A. B. Garland, agent of The New York Life Insurance Company, as I understood it, on this policy, but do not now remember the date, the amount, or anything special about it. During 1863 & 1864 all legitimate business intercourse between the sections of deceased & the defendant was cut off or interrupted by war.

To 5th interrogatory says: My testimony was taken in regard to the death, time, &c., at the time Dr. Murrell was, but it was not so full as I have here given it. What was then said was only the proof usually furnished to the company in such cases.

57 To 6th interrogatory says: I know Mr. Clopton, though not a man of large means, was amply able to pay the premiums on his policy, and that it was his habit usually to have the money for the purpose already deposited to his credit with us. He was a man of unusual promptness in the discharge of his pecuniary obligations.

Cross-examined:

To 2d cross-interrogatory says: The officiating clergyman & physician resided about two and a half miles from the residence of Mr. Clopton. I knew Mr. Clopton about twenty years before his death.

To 4th cross-int. he says. My answers in relation of payment of premiums under this policy are from my personal knowledge. The reasons I have given why the premiums were not paid are from my personal knowledge & information. The only person present while I was giving my deposition was J. H. Lewis, the notary public, when it was taken.

GEORGE H. BURCH.

58 The copy of the letters of administration, marked G. H. B., filed with foregoing deposition, is as follows:

EXHIBIT G. H. B.

At a county court, held for Campbell County, at the court-house thereof, on Monday, 11 day of July, 1864, on the motion of Mary A. Clopton, who made oath as administratrix, and, together with Ann Hollins, by Geo. H. Burch, her attorney in fact, her security, who justified, entered into, & acknowledged a bond in the penalty of twenty thousand dollars, conditioned as the law directs, certificate is granted her for obtaining letters of administration on the estate James C. Clopton, dec'd, in due form, and the said bond is ordered to be recorded, together with the power of attorney from said Ann Hollins to Geo. H. Burch.

Hugh Scott, W. R. Scott, Woodson Payne, H. W. Barksdale, & Jno. O. Armistead, or any three appraisers.

A copy. Teste:

F. R. FOWER, *C. Ctk.*

59 *Deposition of G. A. Dinguid, H H.*

Also the deposition of George A. Dinguid, taken at same time and place, who, being first duly sworn, in answer *to*—

To 1st interrogatory says: James C. Clopton is dead. He died at his residence, about 3½ miles from Lynchburg, on the Lexington turnpike. He was burried the 20th day of May, 1864, & died, I suppose, about the 18th or 19th of that month.

To 2d interrogatory says: I do not know who was the officiating pastor, or minister at his funeral, nor do I know who the physician was who treated him in his last sickness. I do not know of what sickness he died, nor how long he was sick before he died. I did not see him expire. I saw him after he was dead, & put him in the coffin. I can't say how long after his death he was buried; I suppose some 36 hours. He was buried at Spring Hill Cemetery, about 1½ miles west of Lynchburg. I do not think there are any monuments over his grave.

60 There was no sexton present on the occasion. I was the undertaker, & had the grave dug, and put him in the grave. The coffin and burial expenses were paid for by J. W. & G. H. Burch—I suppose as friends or agents of Mrs. Clopton. I don't know whether letters of administration have been granted on his estate.

To the 4th interrogatory he says: I know nothing in regard to the payment of premiums on policy in question. In 1863 & 1864 all business communication between the sections of the deceased & the defendant was cut off by reason of the war then pending.

To 5th interog. he says: Some 12 or 18 months ago I testified in relation to Mr. Clopton's death burial; but I do not think any of the other questions were asked me.

To 6th he says: I know nothing further material to either party to this suit.

Cross-examined:

To 2d cross-interrogatory says: I don't know how far from the
61 residence of Mr. Clopton the officiating clergyman & physician resided; I had known him fifteen years before his death at least.

To 4th cross-int.: I said nothing about the premiums; what I have said why premiums were not paid in '63 & '64 of my own personal knowledge. G. H. Burch, L. H. Lewis, & W. R. Scallen only persons present while I was deposing.

G. A. DINGUID.

Deposition of W. R. Scott, H H.

Also the deposition of W. R. Scott, at same time & place; who, being sworn, in answer—

To 1st interrogatory says: Rev'd Jas. C. Clopton is dead. He died at his house, on the Lexington turnpike, in Campbell County, about 3 miles from Lynchburg. I do not remember even the year of his death, but it was some time during the war.

To 2d interrogatory he says: Rev. Mr. Dodge, of the Lynchburg Baptist Church, read the burial service, but I believe the fun-
62 eral was preached afterwards. I do not know what physician treated him in his last sickness. I thought he died of pneumonia. I cannot say how long he was sick before he died; I do not remember. I was present & saw him expire & closed his eyes, & also saw him after he was dead. He died one night, & the second day after he was buried. He was buried at Spring Hill Cemetery, about 1½ miles west of Lynchburg; there according to my recollection, no monuments over his grave the last time I saw it. I do not know who the sexton was. I aided in the burial. Mr. Dinguid was the undertaker who officiated on the occasion. I know nothing about the payments for burial cases or coffin, or by whom. I believe that letters of administration were granted on the estate to Mrs. M. A. Clopton.

To 4th int. says: I know nothing about the payments of the premiums; the war cut off all communication between North & South.

63 To 5th says: My testimony in regard to this matter was taken before.

To 6th he says: I know nothing in addition to that which I have already stated.

Cross-examined:

To 2d cross-int. says: Mr. Dodge, the clergyman, resided about 3 miles from Mr. Clopton. I don't know who the physician was. I had known Mr. Clopton about 15 or 16 years before his death.

To 4th cross-int. says: I said nothing about the payment of premiums; the reason I assigned why, in 1863 & 1864, the premiums may not have been paid were from my own personal knowledge. E. H. Burch, P. H. Ryan, J. H. Lewis, the notary, are the only persons present while I was giving my testimony.

W. R. SCOTT.

190 22, for insurance in the sum of $5,000 on the life of yourself, will be due on 13 day of March, 1860.

Respectfully, y'rs,

PLINY FREEMAN, *Actuary.*

70

$108	90, cash, 60 per cent.
8	72, int. on former notes.
117	62
72	60, note, 40 per cent.
190	22

A. B. GARLAND, *Agent.*

PETERSBURG, *March* 12, '60.

Elder J. C. CLOPTON.

D'R SIR: This notice has been delayed in consequence of the express co. having mislaid the package, & I did not get it until this morning. I have entered your premium as paid on my books, so as to give you the full benefit in case of accident. You will please call & pay your premium to Mess. Peters, Spencer & Co., of Lynchburg, with whom I have made arrangements to collect for me this month, not being able to come up as usual myself.

Your first dividend of 30 per cent. was placed to your credit on the books of the company on the 1st day of Jan'y last, which divi-
71 dend bears int. from date, & will be paid to you *to you* either in cash or deducted from your next premium.

Very truly,

A. B. GARLAND.

Letter, L L.

Also the letter dated Feb'y 21, 1867, marked L L, which letter is as follows, viz:

OFFICE OF THE NEW YORK LIFE INSURANCE COMPANY,
112 & 114 *Broadway.*

T. H. FREY, Esqr., *Lynchburg, Va.*

DEAR SIR: I have your letter of 16th inst. The value of a policy surrendered on which the premiums have been paid only partly in cash is explained at page 5 of the enclosed circular. Such was policy 12279.

Yours, truly,

MORRIS FRANKLIN, *Pres't,*
By ACTUARY.

It is also agreed that the pl'ff attorneys transmitted the foregoing proofs G G, on 24 August, 1868, to the defendant, and that
72 def't received them on or about August 27th or August 28, 1868.

And this was all the evidence in the cause; and thereupon the court, being sufficiently advised, rendered the following judgment, to wit:

Judgment.

This action having been previously submitted, and the court having heard the evidence & argument herein, and being now sufficiently advised, it is ordered & adjudged by the court that the pl'ff recover of the

said defendant the sum of four thousand six hundred & twenty-one dollars & 53 cents, ($4,621 53,) with interest thereon, at the rate of 6 per cent. per annum, from October 28, 1868, until paid, & their costs herein expended, & may have execution therefor.

And to the judgment the defendant excepts and prays an appeal to the court of appeals; which is granted.

73 And then came defendant, and filed grounds for a new trial herein, and moved the court to set aside the judgment and grant a new trial.

And the following order was made thereon Sept. 17, 1869:

Overruling motion for new trial.

"The def't this day filed grounds for a new trial, and the court overruled the motion, to which the defendant excepts, and prays an appeal to the court of appeals, which is granted; and a bill of exceptions was tendered, signed by the court, and ordered to be filed & enrolled as a part of the record herein."

The following are the grounds for a new trial filed:

Grounds for a new trial.

"The defendant moves the court to set aside the judgment herein and grant a new trial herein upon the following grounds:

"1st. The court erred in overruling the demurrer to the petition & amended petition.

"2d. The court erred as to the law and the evidence in the final judgment."

74 The court overruled the motion for a new trial & refused to set aside the judgment; to all of which the defendant excepted, & presents this his bill of exceptions, & prays that same be signed, sealed, & made part of the record; which is done.

(Signed) G. W. WILLIAMS, *Cir. Judge.*

DAVIESS CIRCUIT COURT:

I, John P. Thompson, clerk of said court, do certify that the foregoing is a full and complete transcript of the record and proceedings had in the action mentioned in the caption.

Given under my hand this 20th day of October, 1869.

JOHN P. THOMPSON, *Clk.*

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76 And afterwards, to wit, on the 11th day of February, 1870, the following order was entered herein:

Order of argument & submission.

NEW YORK LIFE INS. CO. vs. CLOPTON, &C. } Daviess.

This cause came on, and was argued by Hon. A. J. James for appellees, and Gen'l Jno. M. Harlan for appellants, and submitted; but the court, not being fully advised, took time.

And afterwards, to wit, on the 18 day of August, 1870, the following judgment was rendered herein, and opinion delivered:

Mandate of court.

NEW YORK LIFE INS. CO., APPELLANT, vs. MARY A. CLOPTON ET AL., APPELLEES. } Appeal from the Daviess circuit court.

The court being sufficiently advised, it seems to them that there is no error in the judgment.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellees recover of the appellants their costs herein expended.

77 *Opinion.*

State of Kentucky court of appeals, 1870, Aug. 18th.

NEW YORK LIFE INSURANCE COMPANY, appellant, vs. MARY A. CLOPTON, &C., APPELLEES. } Appeal from the Daviess circuit court.

The court, being sufficiently advised, delivered the following opinion herein:

By a policy executed March 13th, 1858, the appellant insured the life

of James C. Clopton, a minister of the gospel, resident near Lynchburgh, Va. The provisions of the policy, so far as material now, are the following:

"The New York Life Insurance Company, in consideration of the sum of $181 50 cts., to them in hand paid by Mary A. Clopton for the benefit of herself and children, and the annual premium of $181 50 cts., to be paid on the 13th day of March in every year during the continu-
78 ance of this policy, do assure the life of James C. Clopton, for the sole use of the said Mary Ann Clopton and children, in the amount of $5,000, for the term of his natural life, commencing the 13th day of March, 1868, at noon. Provided always that it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions: In case the s'd Mary Ann Clopton shall not pay the s'd premiums on or before the several days hereinafter mentioned for the payment thereof, then, and in every such case, the company shall not be liable to the payment of the sum insured, or any part thereof, and this policy shall cease and determine."

James C. Clopton died in May, 1864, after paying all the premiums payable before 13th March, 1862, but not actually paying the premiums for 1862, '3, & '4.

Mrs. Clopton and her children brought this action for the amount of the insurance, after deducting the three unpaid premiums,
79 which the appellant's agent, A. B. Garland, still residing in Va., and who received all the other premiums, refused to accept.

The answer resisted the action on two grounds:

1st. That the civil war dissolved the contract.

2nd. That the non-payment of the three last premiums avoided the policy.

On the double issue thus joined the circuit court, to whom the law and the facts were submitted, after deducting from the $5,000 the aggregate of the unpaid premiums, adjudged to the appellees the balance, with legal interest from the date of the demand and refusal to pay.

A reversal is sought on each of those grounds, urged with signal ingenuity and great ability. But cogent as the argument is felt to be on assumed analogies, plausible generalities, and indiscriminating dicta, a close analysis of principle, policy, and judicial authority inclines us to concur with the circuit court in its judgment, though not for
80 precisely the same reasons. The two controlling questions will, as briefly as perspicuity will allow, be now considered in the order in which they have been presented.

Although there is neither proof nor any presumption that either Jas. C. Clopton or the appellees or Garland by any voluntary act helped to incite or prosecute the rebellion against the General Government, or in any way participated as an actual belligerant in the strife between the hostile sections, yet their residence in the southern section made them and appellant technical enemies, and the established laws of such internecine war interdicted all commercial intercourse between such antagonistic parties, and, consequently, any commercial contract or payment made between them during the war would have been unlawful and void. The same principle and policy of the law did not avoid a pre-existing and valid contract which a single act, such as payment of a debt,
81 might have performed; in such cases, a suspension of remedy during the war, the consistent and only legitimate effect of the war on such contracts. But both principle and policy would have dissolved a contract made before the war for "continuing performance," such as partnership or affreightment. Dissolution is the natural and

necessary effect of a change so radical in the status, rights, and duties of such parties.

The appellant's counsel urge the application of this last doctrine to this case, insisting that the war revoked Garland's agency, and also that the contract was one of continuing performance, and therefore was dissolved, and not merely suspended. We do not see the law in that light.

When a single act, such as the payment of a debt, would perform a contract made before the war, belligerant policy interdicted it because it might aid the enemy in the prosecution of hostilities; consequently, suspension of performance until the restoration of peace would
82 effectuate the whole aim of the law without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle and end of the temporary interdict. In that class of cases it is the contract and not the performance that is continuing; and a suspension of remedy, and not a dissolution of the contract, is all that is necessary, befitting, or just.

But in such cases as partnership or affreightment the performance is continuous and unremitting until the end of the contract shall have been consummated; and, therefore, as supervening war between the parties disables them from performing any of the incumbent duties and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war. And this illustrates "continuing performance" and the contradistinctive reason for dissolving the contract instead of suspending the remedy in that class of
83 cases. The duties of partners to each other while the relation subsists are amicable and incessant. A war which puts them in a state of hostile antagonism disrupts their business relations, and incapacitates them to perform their duties to each other: such a change is itself, in fact and in law, a dissolution. In like manner the performance of a contract of affreightment being amicable and incessant from the commencement to the completion of the transportation, a war which makes it contraband, and thereby frustrates its object, necessarily destroys the legal obligation of the contract, and the law cannot substitute another to be performed after the close of the war.

But the reason for dissolution in these two classes of cases seems to be inapplicable to contracts which may be performed by a single act, or by periodical acts, between which there is nothing to perform, and consequently no continuity of performance.

84 Between a single act and such periodical acts there is no apparent difference in reason or principle; therefore the law which only suspends the remedy in the one case cannot consistently dissolve the contract in the other.

According to this definition the ordinary contract of insurance does not seem to belong to the class of "contracts of continuing performance."

Insurance is a contract sui generis, governed by a peculiar and rather an arbitrary code of the modern common law, but recently moulded and not yet stamped in all respects with conclusive authority. Its character, however, is so far matured and established as to distinguish it essentially from ordinary commercial contracts, and especially in the effect of war on its pre-existing validity, which the war, as a general rule, destroys, whether the contract belong to the catagory of "continuing performance" or not.

In the case of Leathers vs. The Commercial Insurance Comp'y
85 of Cincinnati, (2nd Bush.,) this court, without special consider-

ation, inadvertently illustrated by "partnership and insurance" contracts of "continuing performance." Affreightment would have been more appropriate than insurance. But that inapposite suggestion was immaterial; and, as the case was properly adjudged on another, and the only judicial point, the obitur inadvertance is entitled to no consideration in this case, and we now consider insurance as a contract not dissoluble as of "continuing performance," but on another ground to be presently considered. and which would sustain our judgment in the case supra, even if the risk had continued until after the inauguration of the war.

In this case the insurance was an executed entirety for the prescribed "term," and the only performance which could devolve on the underwriter was to pay the stipulated amount of $5,000, in the event
86 of loss insured against, fulfilment of which was not a continuing act, but a single act of a continuing contract; and the consideration, though payable in annual installments, was yet an entirety also; and, as already suggested, full performance was not, as defined, of that kind technically styled continuing. Consequently, the war did not dissolve the contract on any such ground as that on which it would have dissolved a contract of partnership or affreightment. But, as a general rule, war may dissolve an insurance when it would only suspend legal remidy on ordinary commercial contracts not of continuing performance; and this is the most distinctive difference between a policy and other contracts.

The only phylosophical or authoritative reason for this distinction is the impolicy of assured indemnity against the perils to life or to property incident to a state of war between the parties to the contract of insurance; and, consequently, the principle which avoids such con
87 tracts made, during the war, is lately extended to the interdiction of the continuance, during the war, of such as were previously made and were valid when made.

To illustrate the principle and its application, as recognized in England, the following British decisions are here cited: Furstado vs. Rogers, (3 Bos. & Pul., 191;) Kettner vs. Le Messurier, (4th East., 396;) Gamba vs. Le Mussurier, (4th East., 407;) and Brandon vs. Curling, (4th East., 410.)

In Furstado vs. Rogers, L'd Alvanly, ch. jus., in delivering an elaborate opinion, said that "when a British subject insures against capture, the law infers that the contract contains an exception of capture made by the government of his own country."

In Kettner vs. Le Messurier, L'd Ellenborough said, respecting the effect of a subsequent war on a policy antecedently issued, "that an insurance against British capture eo nomine would be illegal and void upon its face, as being directly and obviously repugnant to the interests of the state; and that, if such an insurance made in terms by a
88 British subject would be void, an insurance indirectly producing the same effect, by the application of the general terms of the policy to the particular event of a British capture, would be equally illegal;" and the case of Gamba vs. Le Messurier is confirmatory.

In Brandon vs. Curling L'd Ellenborough extended this principle to all insurances of property by interpolating as implied the following condition:

"Provided, That this insurance shall not extend to cover any loss happening during the existance of hostilities between the respective countries of the assured and assurer."

It may be a grave question whether the implied condition as to perils

of the war should be extended beyond the belligerant right of capture or destruction by the government of the insurer, and to that extent only we may admit that the continuation of the policy during war would be illegal, and its pre-existing obligation become avoided.

89 But the principle of this concession would not avoid a policy insuring property which is exempted by law from belligerant power; and while it would avoi a policy insuring the life of one who becomes an actual enemy of the government of the insurer, which had the right to destroy that life, it would not effect the validity of an insurance of the life of a neutral or passive non-combatant, over whose life there is no belligerant power; for, though the domicil which makes him a technical enemy whose property may be lawfully captured as enemies' property, yet as such nominal hostility does not subject his life like his estate to peril, no belligerent right is affected by the continued validity of the insurance, and, consequently, in such a case neither authority nor principle would avoid the policy any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation. (Kerr vs. Andrade, Taunt., 504.)

90 Whatever we may think, therefore, of the entire case of Brandon vs. Curling, we feel satisfied that no allowable construction of the facts or consistent application of the law in the case we are now adjudging will permit us to decide that the war dissolved the contract of life insurance.

Nor can we adjudge that non-payment of the premiums after the inauguration of the war avoided the policy.

However lawful the condition of avoidance, as prescribed in this case, may be admitted to be, it is in effect a forfeiture which ought not to be favored. To subject to forfeiture all the premiums paid, as well as the $5,000 for the loss of life, would be harshly and unreasonably penal for no better cause than the inevitable non-precise payment of another installment of premium which the law prevented the appellant from a right to receive. None of them can be presumed to have con-

91 templated such disabling war or to have intended by the *the* condition of avoidance more than voluntary failure to pay when there was legal ability to receive the premiums.

Then, as according to principle and consistent authority the contract was not dissolved by the war, how can this court, consistently with the spirit of the literal condition and the facts of the case, adjudge the policy avoided by the inevitable non-payment of premiums? Such a decision would seem to be as unreasonable as unjust.

Had it been true, as assumed by the appellant's learned counsel, that the war totally revoked the Virginia agency, then there could have been no legal payment unless the domicil of the assured had been removed within the federal lines, which appellant could not have expected nor reasonably required. On this hypothesis there could have been no avoidance, but postponement only. But on this point the law is

92 more favorable to the appellant; for, as adjudged by the Supreme Court of the United States in Ward vs. Smith, (7th Wallace, 452,) while the war revoked Garland's authority to negotiate policies, it did not revoke his power to receive premiums for policies previously issued. The war did not, therefore, prevent a legal payment to Garland in Virginia, which consequently would have released the liability of the appellees for the amount so paid.

But, according to the same case, Garland, had he received, could not have legally paid over to his constituent in New York during the war, and consequently no such payment to Garland would have been avail-

able to the appellant otherwise than by looking to the agent as custodian, subject to all the hazards, until the close of the war.

For that reason, and also because, as he testified, the money, if deposited with him for his constituent, would have been liable to spoliation under an act of confiscation by the confederate congress,
93 Garland refused to receive the premium for 1862, which was punctually tendered to him in the local currency of Virginia; but, considering it best for all parties, he substituted a bond for payment, with interest, at the end of the war. Having, as he also testified, received all the previous premiums in Virginia currency, and paid it over to the appellant without objection, his authority so to receive might be presented by the assured, and the fact that Virginia was the place of payment might have implied that the currency of that State at the time of payment, however it may then have been changed and depreciated, would have been received by the appellant. But, however this may be, as the appellant could not have lawfully collected the premium, and may have lost it by insolvency or confiscation had it been paid to Garland in money, the tender as made and the substituted bond as
94 executed may be regarded as equivalent to actual payment, and may have been as beneficial to the appellant, and, by its security, even more so.

The refusal to accept the tender for the year 1862 dispensed with a formal repetition for the years 1863 &'4. And, moreover, we may infer from Garland's testimony that bonds were given for these years also.

On these facts we cannot say that the literal non-payment of the third last premiums was either voluntary or prejudicial, or was ascribable even as much to the appellees as to the appellant.

And, so understanding the phase of the case and the attitude of the parties, we cannot, consistently with the spirit of the contract and equal justice to the parties, adjudge the policy void.

The judgment, therefore, of the circuit court, seeming right in principle and just in amount, is affirmed.

95 And afterwards, to wit, on the 27th day of August, 1870, the following order suspending mandate was filed in the clerk's office of this court:

Order suspending mandate.

In court of appeals of Kentucky, August 26, 1870.

THE NEW YORK LIFE INSURANCE CO.
vs.
MARY CLOPTON & OTHERS.

The judgment and mandate in this case are hereby suspended, and appellant is allowed until the 20th Sept'r, 1870, to file a further petition for rehearing in this case.

M. R. HARDIN, *Judge C. A.*

And on same day (27th August, 1870) the following writ of error was filed in the clerk's office of this court:

96 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of Kentucky, greeting:

Because, in the record and proceedings, as also in the rendition of the

judgment of a plea which in the said court of appeals before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit between The New York Life Insurance Company, appellant, and Mary Ann Clopton, Nannie Burks, & Burks, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny F. Clopton, Ben. A. Clopton, the last four children of said Mary A. Clopton, and who are infants, and sue by their next friend, Luther Cottrell, appellees, wherein was drawn in question the construction of the statutes of the United States, and the decision was against the title, right, privilege, and exemption
97 specially set up and claimed under the said statutes, a manifest error hath happened, to the great damage of the said New York Life Insurance Company, as by their complaint appears; we, being willing that the error, if any hath been, should be dully corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the
98 said Supreme Court, the 23d day of August, in the year of our Lord one thousand eight hundred and seventy.

[L. S.] W. A. MERIWETHER,
Clerk of the Circuit Court of the United States for the District of Kentucky.

And afterwards, to wit, on the 20th day of September, 1870, the following order was entered:

Order filing petition.

NEW YORK LIFE INS. CO. vs. CLOPTON. } Daviess.

Came appellant and filed a petition for rehearing, and, on his motion, it is ordered that said filing be entered as of 12th Sept., 1870, nunc pro tunc.

Order overruling petition.

The court, being fully advised, overruled the petition for rehearing herein.

99 STATE OF KENTUKY, *Court of Appeals:*

I, Alvin Duvall, clerk of the court of appeals for the State of Kentucky, do certify that the foregoing 99 pages contain a full and complete transcript of the record and proceedings had in the appeal of The New York Life Insurance Company vs. Clopton, &c., as appears from the records of my office.

Given under my hands and the seal of said court this 28th day of September, A. D. 1870.

[SEAL.] ALVIN DUVALL, *C. C. A.*

100 Court of appeals of Kentucky.

THE NEW YORK LIFE INSURANCE COMPANY }
vs. }
MARY A. CLOPTON & OTHERS. }

To the chief justice of Kentucky:

Your petitioner, The New York Life Insurance Company, respectfully represents that, in the above-entitled cause, there was drawn in question the construction of a clause of the Constitution of the United States, also the validity and construction of certain statutes of the United States, and the final judgment of this the highest court of law or equity of this State was against the title, right, privilege, and exemption specially set up and claimed by your petitioner under said clause of the Constitution and under said statutes of the United States, all of which appears of record in this case.

Wherefore your petitioner prays for the allowance of a writ of error, as provided by the twenty-fifth section of the act of Congress approved 24th September, 1789.

HARLAN, NEWMAN & BRISTOW,
Att'ys for The New York Life Insurance Company.

101 (Indorsed:) N. Y. Life Ins. Co. vs. Clopton, &c. Petition for allowance of writ of error.

Filed before me, and writ of error allowed & bond executed. Clerk of court of appeals will file papers this Sept. 20th, 1870.

G. ROBERTSON, *Ch. Jus. Ky.*

Filed in clerk's office, court of appeals, Sept. 20th, 1870.

A. DUVALL, *C. C. A.*,
By CHAS. HAYDON, *D. C.*

102 Know all men by these presents that The New York Life Insurance Company have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Frederick G. Scriba, of the city of New York, their true and lawful attorney for them, and, in their name, place, and stead, to execute and deliver any and all bond or bonds in such penalty and with such condition as may be necessary to remove from the court of appeals of the State of Kentucky the suit of Mary A. Clopton against the said company into the United States court, giving and granting unto our said attorney full power and authority in the premises, as fully, to all *extents* and purposes, as we might or could do if present and acting therein, hereby ratifying and confirming, and agreeing to ratify and confirm, all and whatsoever our said attorney shall lawfully do by virtue hereof.

{ NEW YORK LIFE INSURANCE COMPANY'S SEAL. } In testimony whereof we have caused our corporate seal to be hereunto affixed, and the same signed by our president this the sixteenth day of September, anno
103 Domini one thousand eight hundred and seventy.

MORRIS FRANKLIN, *President.*

judgment of a plea which in the said court of appeals before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit between The New York Life Insurance Company, appellant, and Mary Ann Clopton, Nannie Burks, & Burks, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny F. Clopton, Ben. A. Clopton, the last four children of said Mary A. Clopton, and who are infants, and sue by their next friend, Luther Cottrell, appellees, wherein was drawn in question the construction of the statutes of the United States, and the decision was against the title, right, privilege, and exemption
97 specially set up and claimed under the said statutes, a manifest error hath happened, to the great damage of the said New York Life Insurance Company, as by their complaint appears; we, being willing that the error, if any hath been, should be dully corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the
98 said Supreme Court, the 23d day of August, in the year of our Lord one thousand eight hundred and seventy.

[L. S.] W. A. MERIWETHER,
Clerk of the Circuit Court of the United States for the District of Kentucky.

And afterwards, to wit, on the 20th day of September, 1870, the following order was entered:

Order filing petition.

NEW YORK LIFE INS. CO. vs. CLOPTON. } Daviess.

Came appellant and filed a petition for rehearing, and, on his motion, it is ordered that said filing be entered as of 12th Sept., 1870, nunc pro tunc.

Order overruling petition.

The court, being fully advised, overruled the petition for rehearing herein.

99 STATE OF KENTUKY, *Court of Appeals:*

I, Alvin Duvall, clerk of the court of appeals for the State of Kentucky, do certify that the foregoing 99 pages contain a full and complete transcript of the record and proceedings had in the appeal of The New York Life Insurance Company vs. Clopton, &c., as appears from the records of my office.

Given under my hands and the seal of said court this 28th day of September, A. D. 1870.

[SEAL.] ALVIN DUVALL, *C. C. A.*

100 Court of appeals of Kentucky.

THE NEW YORK LIFE INSURANCE COMPANY
vs.
MARY A. CLOPTON & OTHERS.

To the chief justice of Kentucky:

Your petitioner, The New York Life Insurance Company, respectfully represents that, in the above-entitled cause, there was drawn in question the construction of a clause of the Constitution of the United States, also the validity and construction of certain statutes of the United States, and the final judgment of this the highest court of law or equity of this State was against the title, right, privilege, and exemption specially set up and claimed by your petitioner under said clause of the Constitution and under said statutes of the United States, all of which appears of record in this case.

Wherefore your petitioner prays for the allowance of a writ of error, as provided by the twenty-fifth section of the act of Congress approved 24th September, 1789.

HARLAN, NEWMAN & BRISTOW,
Att'ys for The New York Life Insurance Company.

101 (Indorsed:) N. Y. Life Ins. Co. vs. Clopton, &c. Petition for allowance of writ of error.

Filed before me, and writ of error allowed & bond executed. Clerk of court of appeals will file papers this Sept. 20th, 1870.

G. ROBERTSON, *Ch. Jus. Ky.*

Filed in clerk's office, court of appeals, Sept. 20th, 1870.

A. DUVALL, *C. C. A.*,
By CHAS. HAYDON, *D. C.*

102 Know all men by these presents that The New York Life Insurance Company have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Frederick G. Scriba, of the city of New York, their true and lawful attorney for them, and, in their name, place, and stead, to execute and deliver any and all bond or bonds in such penalty and with such condition as may be necessary to remove from the court of appeals of the State of Kentucky the suit of Mary A. Clopton against the said company into the United States court, giving and granting unto our said attorney full power and authority in the premises, as fully, to all *extents* and purposes, as we might or could do if present and acting therein, hereby ratifying and confirming, and agreeing to ratify and confirm, all and whatsoever our said attorney shall lawfully do by virtue hereof.

{NEW YORK LIFE INSURANCE COMPANY'S SEAL.} In testimony whereof we have caused our corporate seal to be hereunto affixed, and the same signed by our president this the sixteenth day of September, anno

103 Domini one thousand eight hundred and seventy.

MORRIS FRANKLIN, *President.*

104 Know all men by these presents that Richard B. Alexander and L. L. Warren, of the city of Louisville, county of Jefferson, and State of Kentucky, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, John M. Harlan, of the said city, county, and State, their true and lawful attorney for them, and in their name, respectively, as sureties of The New York Life Insurance Company, to execute and deliver any and all bond or bonds, in such penalty and with such condition as may be necessary, to prosecute a writ of error, with supersedeas, from the judgment of the court of appeals of Kentucky, in the action of The New York Life Insurance Company, appellants, against Mary A. Clopton, &c., appellees, to the Supreme Court of the United States; giving and granting our said attorney full power and authority in the premises as fully, to all intents and purposes, as they might or could do if present and act-
105 ting therein; hereby ratifying and confirming, and agreeing to ratify and confirm, all and whatsoever our said attorney shall lawfully do by virtue of these presents.

Witness our hands this 20th day of September, 1870.

R. B. ALEXANDER.
L. L. WARREN.

Witness:
F. G. SCRIBA.

106 Circuit court of the United States, sixth circuit and district of Kentucky.

THE NEW YORK LIFE INSURANCE COMPANY, appellants,
versus
MARY ANN CLOPTON, NANNIE BURKS, & Burks, her husband, M. S. Clopton, Cornelia, L. Clopton, Fanny F. Clopton, & Ben. A. Clopton, appellees.

Know all men by these presents that we, The New York Life Insurance Company and R. B. Alexander and L. L. Warren, are held and firmly bound unto the above-named Mary Ann Clopton, Nannie Burks, & Burks, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny F. Clopton, and Ben. A. Clopton, in the sum of ten thousand dollars, to be paid to the said Mary Ann Clopton, Nannie Burks, & Burks, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny F. Clopton, & Ben. A. Clopton; to which payment, well and truly
107 to be made, we bind ourselves, and *and* each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 20th day of September, A. D. 1870.

Whereas the above-named The New York Life Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the court of appeals of the State of Kentucky, sitting at Frankfort, against the said Mary Ann Clopton and others, in the case of The New York Life Insurance Company, appellants, versus Mary Ann Clopton et al., appellees:

Now, therefore, the condition of this obligation is such, that if the above-named The New York Life Insurance Company shall prosecute said writ of error to effect, and answer all damages and costs if they

shall fail to make good their plea, then this obligation shall be
108 void; otherwise the same shall be and remain in full force and virtue.

NEW YORK LIFE INSURANCE COMPANY,
By FRED. G. SCRIBA, [L. S.]
Agent & Att'y in fact.
R. B. ALEXANDER, [L. S.]
By JOHN M. HARLAN,
Atto. in fact.
L. L. WARREN, [L. S.]
By JOHN M. HARLAN,
Atto. in fact.

Taken and acknowledged before me this 20th day of September, A. D. 1870.

G. ROBERTSON,
Ch. Jus. Ky.

109 UNITED STATES OF AMERICA,
District of Kentucky, ss:

To Mary Ann Clopton, Nannie Burks, and Burks, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny F. Clopton, & Ben. A. Clopton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the Commonwealth of Kentucky, wherein The New York Life Insurance Company are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 20th day of September, in the year of our Lord 1870, and of our independence the ninety-fifth.

[L. S.] G. ROBERTSON, *Ch. Jus. Ky.*

20TH SEP'R, 1870.

110 On this 20th day of September, in the year of our Lord one thousand eight hundred and seventy, personally appeared Jno. W. Rodman before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Andrew J. James, attorney and counseller of the appellees, defendants in error, Mary A. Clopton, Nannie Burks, Burks, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny F. Clopton, & Ben. A. Clopton.

JNO. W. RODMAN.

Sworn to and subscribed before me by John W. Rodman this 20th September, 1870.

CHA'S HAYDON,
D. C. C. A.

(Indorsed:) New York Life Ins. Co. vs. Mary Ann Clopton et al. Citation & 2 copies.

Filed in clerk's office court of appeals this 20 Sept'r, 1870.

A. DUVALL, *C. C. A.*,
By CHA'S HAYDON, *D. C.*

111 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of appeals of the State of Kentucky, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Kentucky before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between The New York Life Insurance Company, appellant, against Mary Ann Clopton, Nannie Burks, and Burks, her husband, Martha S. Clopton, Cornelia L. Clopton, Fanny F. Clopton, Ben. A. Clopton, the last four children of said Mary A. Clopton, & who are infants, and sue by their next friend, Luther Cottrell, appellees, wherein was drawn in question the construction of a clause of the Constitution of the United States, and the validity and construction of certain statutes of the United States, and the decision was against the title, right, privilege, and exemption specially set up or claimed under such clause of the said Constitution and the said statutes, a manifest error hath happened, to the great damage of the said The New York Life Insurance Company, as by their complaint appears; we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Wash-
112 ington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 20th day of September, A. D. 1870, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] W. A. MERIWETHER,
Clerk of the Circuit Court of the United States for the District of Kentucky.

Allowed by—

G. ROBERTSON, *Ch. Jus. Ky.*

20TH SEP'R, 1870.

(Indorsed:) New York Life Ins. Co. vs. Mary Ann Clopton et al. Writ of error & 1 copy.

Filed in clerk's office, court appeals, Sept'r 20, 1870, and copy also lodged same day for def'ts in error.

A. DUVALL, *C. C. A.*,
By CHA'S HAYDON, *D. C.*

(Indorsement on cover:) No. 496. The New York Life Insurance Company, plaintiff in error, vs. Mary Ann Clopton, Nannie Burks, et al. Kentucky court of appeals.

Filed 19th October, 1870.

Supreme Court of the United States, No. 264.

THE NEW YORK LIFE INSURANCE CO., - Plaintiffs in error,
against
MARY ANN CLOPTON, NANNIE BURK, ET AL, Defendants in error

Brief for D'ts in error.

JAS. B. BECK, Attorney.

Supreme Court of the United States, No. 264.

THE NEW YORK LIFE INSURANCE CO., - Plaintiffs in error,
against
MARY ANN CLOPTON, NANNIE BURK, ET AL, Defendants in error

Brief for Def'ts in error.

The defendants in error have moved this court to dismiss the writ of error, urging that the court has no jurisdiction of the subject matter.

By the Judiciary Act of 1789, sec. 25, 1st vol. Brightly's Digest, page 259.—5. This court was given jurisdiction by writ of error to the highest court of law or equity of the States in three enumerated states of case. These need not be specifically cited, as they have been constantly before the court from its organization.

This case is certainly not within that statute. For no part of the Federal Constitution, nor any

statute of Congress, was either considered in the case, nor was any right claimed or title asserted under the Federal laws decided or denied in the State court. Nor was any State statute or authority exercised under the State drawn in question, and neither the judgment of the court, nor the record anywhere, import that any of these were compassed by the issue.

The suit in the original court was for a breach of the covenant, in a life policy of insurance.

The defense was grounded on two points: One that the policy had lapsed, or been forfeited, by the non-payment of the premiums; and this is a forfeiture provided (and the only one) in the policy. The other that the war supervening after the contract was made avoided it.

The first of these defenses involves an inquiry of fact and law, of which the court, having the parties before it, has jurisdiction; and is a question this high court will not retry should it hold jurisdistion of the case. [Matthews vs. Zane, 7 Wh. 164.]

The other defense does not, in the plea, go on the ground that the policy is avoided by any act of Congress, or any Constitution, but simply affirms that the policy was avoided by the war. This implies merely that as matter of common law, the contract by a rule of decision became null.

We will not quote at length of cases where this court has refused jurisdiction under the act of 1789. We however cite 10th Peters' Supreme Court reports, page 368; 12th Peters', page 507; and particularly call the attention of the court to the case of Ocean Insurance Company vs. Polly, 13th Peters, page 157 to 164, a case ruled by Judge Story, in

which Mr. Webster moved to dismiss the writ. His suggestions in support of the motion seem conclusive. That record we think furnished stronger ground than this, for the interposition of this court.

We know of but two enactments of Congress since the act of 1789, conferring jurisdiction on the Supreme court over judgments of the State courts.

The act of 1866, 2d vol. Brightly's Digest, 112, sec. 8, and the act of 1867, same vol., page 203, sec. 4. The former of these has no relevancy to this subject, and the latter is a re-enactment of the act of 1789.

This was an ante-war contract. We inquire did any act of Congress forfeit or annul any such contracts, and if a partnership existed between residents of the Federal States and those that rebelled, were they dissolved by any act of Congress or proclamation of the President; or did they cease, by virtue alone of the common law? As far as we have any knowledge, Congress took no notice of subjects antecedent to the war in any non-intercourse, embargo, or sequestration act. The act of July, 1861, 2d vol. Brightly's Digest, page 276 to 284, certainly neither confiscates this policy, nor does it intimate any retroactive effect. Nor does it authorize the President by proclamation to affect the business relations of any one prior to the war.

And lastly, did the Kentucky court decide when the war begun, or when this contract was or was not affected by the war, or that the war did not exist; or any phase of it, touched by an act of Congress. Every such point was admitted by all the parties. The plaintiff plead it; the defendant replied it; the court assumed it all, and simply ruled

the effect it had upon the contract; and in deciding this the court had no legislative guidance, and must have resorted to the lights of the common law, and in default of a rule there, must, as Ld. Hardwicke have improvised a rule compatible with the equities of the case. Wherefore we crave the dismissal of the writ of error.

If, however, this court should revise the judgment of the Court of Appeals of Kentucky, we feel no fear that the cogent and conclusive opinion of its venerable Chief Justice will be disturbed.

We can add nothing to the argument bestowed by Judge Robertson, nor the authorities cited and discussed by him; nay, it were sheer vanity for us to presume to further enlighten a subject over which so luminous a professional mind has shed its radiance (the opinion is found at page 77—24.) However a feeling of professional emulation, and anxiety that a just settlement of the rights of these parties should not be disturbed (and because we think we discover a most stubborn persistency in the defendants in error, to baffle a debt at least valid in equity) leads us to quote from a few authorities.

If the agency of Garland, the agent of plaintiffs in error to receive premiums after the war begun, is disputed, we quote Ward vs. Smith, 7th Wallace, 452, quoted in the opinion under consideration; also a forfeiture of a policy of insurance is to be construed strictly, and its enforcement is not to be favored. North Berwick Co. vs. N. E. F. and M. Ins. Co., 52 Me.

But in view of the Judiciary act of 1789, and the case of Matthew vs. Zane before cited, we suppose this defense will not be discussed.

This policy was not even a commercial contract, and implied no intercommunication between the parties to it. It was for the mutual payment of money, and though it was unlawful for either to pay pending the war, there could be no reason why it should be utterly rescinded any more than any other contract (a bill or bond) for money. It was lawful between the parties when made, and the insured promptly performed his contract as long as he had the exercise of his own will. He was all the time anxious to, and endeavored to still perform it, but was hindered by the agent of the plaintiffs; by the war, and laws of non-intercourse; and to say it is cut up because it passes by the name of a policy, instead of a bill or note, is to maintain a difference without a distinction.

This policy radically differs from mere mercantile or fire insurance. In the latter the loss may be mitigated or repaired when it occurs, if the insurer may have access to the thing insured; he may repair the damage, or take charge of the wreck, and sustain a less loss than when he is debarred from going to the place of the loss. He may be put to a loss by fraud, which he has no facility for detecting if war hinders his will, and when the intervention of war increases his peril, or thus deprives him of any of the probable or anticipated remedies in case of loss, sound reason ought to absolve him, and especially so as he might by the contract be tempted to violate allegiance, and to use contraband means to preserve the property for which he was bound.

But this is none of it the case in a life policy. The insurer here fixes his loss by his contract; when it occurs, there can be no salvage; he has predes-

tined it so much, the peril is not increased by the war unless the insured take part in actual hostilities; then he would forfeit the policy, not though by the fact of war, but by his own act. But though in estimation of law, the parties are constructive enemies, and the insured is the technical enemy of the forces in the field; yet the latter having no legal power over his life or limb, (which is the thing insured); his war status does not enhance the risk undertaken on his peace status. In fine, the war establishes a non-intercourse between the parties, depriving each of a place in the home forum of the other, thus suspending the right until the return of peace re-establishes a remedy. The Kentucky court cites Kerr vs. Andrade, Taunt. 504, to which we invite this court's attention.

Clopton was a neutral in the war, and without the technical enmity assigned him by law, must be presumed to have been a neutral from loyalty to the Government, as that was his duty; so there could be no moral reason for depriving him of his contract; and to do so in the court of his sovereign, would certainly be to suppress one of the strongest motives to allegiance.

We confidently ask this court to concur with the court of Kentucky in "so understanding the phase "of the case, and the attitude of the parties, as to "disable it from, consistently with the spirit of the "contract and equal justice to the parties, adjudg-"ing the policy void."

Wherefore we beg an affirmance.

JAS. B. BECK, Att'y,
For Defendants in error.